

BEFORE THE
COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of:

Request for Review and/or Waiver of a Decision of the Universal Service Administrator

CC Docket No. 02-6

by

Zenith Academy
Columbus OH

TO: Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Zenith Academy ("Zenith") respectfully requests that the Federal Communications Commission ("FCC") review the denial of an appeal by the Administrator of the Universal Service Administrative Company ("USAC") regarding a Notification of Commitment Adjustment Letter ("COMAD") whereby USAC is seeking to rescind previously committed E-Rate Program funds for Funding Request Number ("FRN") 1746666. This Request for Review and/or Waiver is made pursuant to §§54.719 through 54.723 of the Commission's rules¹.

¹ 47 C.F.R. §§54.719–54.723

Application Information

Billed Entity Number: 16045756
FCC Form 471 Application Number: 632178
Funding Request Number Appealed: 1746666
Date of Administrator's Decision on Appeal Letter: July 7, 2014
Date of Demand Payment Letter: July 22, 2014
Service Provider: Epiphany Management Group, LLC
SPIN: 143031426

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REASON FOR APPEAL

On March 3, 2009 FRN 1746666 was funded, however, on May 21, 2014 USAC issued a Notification of Commitment Adjustment Letter in the amount of \$33,269.40, stating that:

After multiple requests for documentation and application review, it was determined that the funding commitment for this request must be rescinded in full. Funding was provided for the following ineligible items: installation of products by Epiphany Management that were purchased from CDW-G on FRN 1746642. Installation, activation, and initial configuration of eligible components are eligible if they are part of a contract or bid for those eligible components. Such eligible services may include basic design and engineering costs and basic project management costs if these services are provided as an integral component part coincident with installation. The installation, activation or initial configuration is not part of a contract or bid for those eligible components. The pre-discount cost associated with these items is \$36,966.00. At the applicants 90 percent discount rate, this resulted in an improper commitment of \$33,269.40. FCC rules require that the associated installation for a product or service in general will be provided by the same service provider from which the applicant purchased the product or service. Based on the Miscellaneous section of the Eligible Services List, installation, activation, and initial configuration of eligible components are eligible if they are part of a contract or bid for those eligible components. See the web site, <http://www.usac.org/sl/applicants/beforeyoubegin/eligible-services-list.aspx> for the Eligible Services List. Therefore, USAC has determined that the applicant is responsible for the rule violation. Accordingly, the commitment has been rescinded in full and USAC will seek recovery of any improperly disbursed funds from the applicant.

The COMAD was appealed to USAC, which appeal was summarily denied in the Administrator's Decision on Appeal Letter dated July 7, 2014; on July 22, 2014 USAC issued a Demand Payment Letter for the disbursed amount \$27,346.50.

For the reasons that follow, Zenith Academy requests the COMAD seeking rescission of the funding commitment in the amount \$33,269.40 and the Demand Payment Letter for the disbursed amount \$27,346.50, be dismissed. In the alternative, for good cause shown, Zenith requests the Commission grant it a Waiver of the rule.

STATEMENT IN SUPPORT OF REQUEST FOR REVIEW AND/OR WAIVER

FRN 1746666 for the installation of internal connections products was applied for in FCC Form 471 Application Number 632178. The winning bid of Epiphany Management Group, LLC, the vendor associated with the FRN, included installation for certain products to be purchased from them as well as installation of other products that Zenith purchased from CDW+G under FRN 1746642. FRN 1746666 was reviewed by USAC's Program Integrity Assurance ("PIA") Team and was funded on March 3, 2009. After receiving notification that the FRN was funded, Zenith

proceeded to have Epiphany perform the work and paid its non-discounted portion of the bill; USAC was subsequently invoiced by Epiphany and \$27,346.50 was disbursed. Despite the reimbursements from USAC going to Epiphany via a Service Provider Invoice, USAC sought to only COMAD Zenith who never received the funds.

The main thrust of this Request for Review and/or Waiver is that in 2014 USAC applied a new interpretation of long-standing Eligible Services List ("ESL") language and used it as the basis for COMAD-ing funds for FRN 1746666 (for convenience, this new interpretation will be referred to as the "2014 Interpretation"). This interpretation is one that USAC did not have in effect during the 2008 Funding Year in which Form 471 Application Number 632178 was filed. In fact, the author of this appeal is personally aware of many installation-only FRNs that were funded by USAC from 2007-2012, all of which went through PIA review, and none of which had the 2014 Interpretation asserted at the time.

The Commission has recognized numerous times that an application should be judged by the rules and procedures in effect for that funding year;² USAC's position regarding the rescission of the funding for FRN 1746666 conflicts with this position. The fact that FRN 1746666 was funded after Application #632178 went through a USAC Program Integrity Assurance Review - which included reviewing the contract with Epiphany - renders it apparent that the 2014 Interpretation of the Eligible Services List language was not the one employed by USAC at that time. Zenith's PIA response was unambiguous and clearly showed that the installation services provided by Epiphany Management Group under FRN 1746666 included the installation of equipment purchased from CDW+G under FRN 1895867, as well as cabling

² See *Ysleta Independent School District*, DA 12-1797

and fiber purchased directly from Epiphany. Zenith's responses were deemed satisfactory by USAC's PIA and Quality Assurance teams and resulted in FRN 1746666 being funded. For USAC to invoke the 2014 Interpretation six years after the application was filed is a complete reversal of the rule interpretation that allowed USAC to issue the original funding award.

By basing a 2014 COMAD on an interpretation of ESL language that had been in place in FY2008 but not interpreted that way, USAC has acted to contradict its own procedures that were in effect at the time as well as FCC policy. To allow USAC to proceed with the COMAD will create undue hardship for Zenith Academy, a 90% percent school, who complied with all USAC information requests and abided by all E-rate rules and USAC procedures in effect for FY2008. The COMAD is especially egregious because Zenith is being asked to pay back money it never even received, which is unduly punitive.

Further, unless USAC will be applying this retroactive rule interpretation to all installation-only FRNs for all prior funding years within the look-back period, singling out this applicant is inequitable, creating hardship for the applicant, and against the public interest.

Although USAC never applied this 'rule' in past funding years, in the 2014 Draft Eligible Services List, DA-14-1130, released August 4, 2014, the Commission recognized that flexibility of this 'rule' may be needed to best accommodate the needs of some applicants and has sought comment on the issue of allowing E-rate funding for installation from vendors that do not supply the eligible equipment. This author supports the proposed change as furthering the cost effectiveness and competitive bidding goals of the E-rate program, as well as better serving the needs of the applicants.

Lastly, although Zenith pointed out to the USAC Special Compliance Review and Appeal Teams that the portion of the contract between Zenith and Epiphany included both the installation for cabling and fiber as well as the purchase of CAT5 cabling and the fiber, and therefore fully complied with the 2014 Interpretation, USAC nonetheless ignored this, denied the appeal in full and issued the COMAD for the full post-discount amount of the funding request of \$33,269.40. Common sense would dictate that since a portion of the contract was in compliance with its 2014 Interpretation, at the very least, USAC should have reduced the COMAD by that amount, but it did not.

CONCLUSION

Throughout its application process, Zenith demonstrated compliance with E-rate program rules and regulations. It complied with all USAC requests in a timely manner and followed all core E-rate program requirements. Even if there was a technical violation of a rule, Zenith never intended fraud, abuse or waste of E-rate funds or attempted to act contrary to program rules. Since in 2008 the FRN at issue was scrutinized in PIA and funding was awarded, it seems an erratic decision for USAC to rescind funding based on its changing its interpretation five years later. Zenith received the funding commitment and authorized Epiphany to perform the installation services for which the funding was approved. USAC asking that the funds that were utilized for the intended purpose now be returned, will create hardship for Zenith Academy, especially since no USAC funds were ever disbursed to them.

The Commission has repeatedly reiterated its authority under 47 C.F.R. §1.3 to waive rules for good cause shown and has routinely waived compliance for violations when the record contains no evidence of intent to defraud or abuse the E-rate program and where the public

interest is better serviced by granting a waiver.³ Given the circumstances and the financial hardship the COMAD will cause, Zenith requests the Commission grant it a waiver if any technical rule violation is found, and rescind the COMAD and Demand Payment letters accordingly.

Thank you for your consideration.

/s/ Steve Kaplan

Steve Kaplan

³ See *Request For Review of Decision of the Universal Service Administrator by Bishop Perry Middle School*, DA No. 06-54; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).